

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 16, 2006

GUADALUPE S. MENDEZ v. STATE OF TENNESSEE

Appeal from the Criminal Court for Cumberland County
No. 6141A Lillie Ann Sells, Judge

No. E2005-02198-CCA-R3-PC Filed June 30, 2006

The Petitioner, Guadalupe S. Mendez, appeals from the denial of his petition for post-conviction relief. The Petitioner was convicted of aggravated rape and especially aggravated sexual exploitation of a minor. On appeal, the Petitioner argues that he received ineffective assistance of counsel. After a review of the record, we affirm the post-conviction court's denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

G. Earl Patton, Crossville, Tennessee, for the appellant, Guadalupe S. Mendez.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William E. Gibson, District Attorney General; and Gary McKenzie, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In 2001, the Petitioner was convicted by a jury of aggravated rape and especially aggravated exploitation of a minor. As a result of these convictions, the Petitioner was sentenced to a term of twenty-four years for the aggravated rape and ten years for the sexual exploitation, to be served concurrently with each other but consecutively to a prior sentence. On direct appeal, this Court affirmed the Petitioner's convictions and sentences. State v. Guadalupe Steven Mendez, No. E2002-01826-CCA-R3-CD, 2003 WL 22113461 (Tenn. Crim. App., Knoxville, Sept. 12, 2003), perm. to appeal denied, (Tenn. Jan. 26, 2004). As summarized on direct appeal, the facts underlying these convictions are as follows:

The facts of this case are not in dispute. Fifty-five-year-old Patricia Morgan had a fourteen-year-old granddaughter, K.W.¹ K.W. frequently spent the weekend with her grandmother at her uncle's house. Ms. Morgan developed a "pen pal" relationship with the Defendant, an inmate in the Department of Correction, in early 2000. Shortly thereafter, she began visiting the Defendant and speaking frequently with him over the telephone. When K.W. spent the weekend with Ms. Morgan, K.W. would also speak to the Defendant over the phone.

Ms. Morgan soon fancied herself in love with the Defendant. The Defendant and Ms. Morgan spoke of marriage. K.W. testified that the Defendant told her they were all going to take a road-trip together, during which the Defendant would "have" K.W. on certain days of the week, and "have" Ms. Morgan on the other days of the week. The Defendant also told K.W. that he knew people in New York who could set her up in the modeling industry and she could make \$250,000 a month by being a model.

The Defendant requested Ms. Morgan to take photographs of K.W. and send them to him. On December 2, 2000, the threesome engaged in a photo-shoot, with the Defendant, from prison, giving instructions to both Ms. Morgan and K.W. over the phone. This phone conversation was recorded and the audiotape was played for the jury. This tape and the testimony at trial established that the Defendant told Ms. Morgan to take photographs of K.W. in the nude. Ms. Morgan did so. The Defendant also told K.W. to put her own finger into her vagina; K.W. complied. Ms. Morgan, at the Defendant's request, took a photograph of this "pose" by K.W. Later, the Defendant told Ms. Morgan to put her finger in K.W.'s vagina. Ms. Morgan did so.

Ms. Morgan had the photographs developed and sent them to the Defendant. The photographs were confiscated by correctional officers, and this prosecution followed.

On October 7, 2004, the Petitioner delivered his pro se petition for post-conviction relief to prison authorities for filing. Counsel was appointed, and an amended petition was filed on April 6, 2005, alleging that: (1) he was denied the effective assistance of counsel; (2) his sentence was improperly enhanced in violation of Blakely v. Washington, 542 U.S. 296 (2004); and (3) he had newly discovered evidence. A hearing was held on July 19, 2005, at which only the Petitioner and Trial Counsel² testified. After hearing the evidence presented, the post-conviction court denied relief by written order on September 9, 2005. This timely appeal followed.

¹It is the policy of this Court to identify minor victims of sex crimes by their initials.

²It appears from the record that two attorneys represented the Petitioner during his trial. However, only one of them testified at the post-conviction hearing. For purposes of this opinion, references to Trial Counsel include the actions of either or both attorneys.

ANALYSIS

On appeal, the Petitioner raises the single issue of whether he received ineffective assistance of counsel.³ To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the petitioner's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The petitioner bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The petitioner's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks, 983 S.W.2d at 246.

³ Because the Petitioner failed to include the other issues in his appellate brief, the Petitioner has waived appellate review of those issues. Tenn. R. App. P. 13(b).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

In this appeal, the Petitioner contends that the representation he received from his trial counsel was ineffective. The Petitioner's brief argument is as follows:

[The Petitioner] gave undisputed testimony that he filed all of his own pre-trial motions. Further, [Trial Counsel] testified that he met as few as two separate times with the [Petitioner] before trial.

Because of this, [the Petitioner] was unable to discuss the various aspects of this case with his attorney prior to trial, and unable to effectively assist in his own defense.

The Petitioner's argument fails to articulate how counsel was not adequately prepared for trial, fails to state what facts about the case were not communicated to him prior to trial, and fails to specify how he was prohibited from assisting in his own defense. Moreover, the Petitioner does not provide this Court with any explanation as to how he was prejudiced by these deficiencies. Accordingly, the Petitioner has waived appellate review. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

Nevertheless, we have reviewed the issue, and we conclude that the Petitioner's ineffective assistance of counsel claim is without merit. The Petitioner contends that he received ineffective representation because his trial counsel was not adequately prepared for trial, failed to meet with him a sufficient number of times, and failed to discuss the facts of the case with him.

At the post-conviction hearing, the court stated:

And as [Trial Counsel] testified to, he had explained and gone over, this [Petitioner] had two lawyers, . . . both experienced trial lawyers who worked with him and negotiated, even pursuant to his own testimony what would have been an excellent, in hindsight certainly, an excellent deal for this [Petitioner] that he didn't take. And that's his right. [The Petitioner] doesn't have to take any deal and he didn't. He went to trial and lost.

It would be different had his lawyers not prepared and not cross examined and not worked with him in preparation for the case. But I do find that's the case here,

based on what I've heard today and the testimony and review of this record. I do not find that these lawyers were ineffective.

Furthermore, in its order denying relief, the post-conviction court found:

[Trial Counsel] testified he represented the Petitioner at trial and on direct appeal, and fully discussed the case and evidence with the Petitioner including all aspects of possible defenses. . . . He further testified, Petitioner helped him throughout the trial and played an active role in his defense. . . .

. . . Although Petitioner testified he was not satisfied with [Trial Counsel's] performance, he offers no reasonable defense strategy or specific deficiencies of said [Trial Counsel]. The Court further finds testimony of [Trial Counsel] to be reasonable, credible, and supported by the record. The Court finds testimony of Petitioner not credible and assigns no weight thereto. . . .

The evidence does not preponderate against the findings of the post-conviction court.

At the post-conviction hearing, Trial Counsel testified that he met with the Petitioner "on several occasions," that he discussed the case with the Petitioner, that he cross-examined the State's witnesses, and that the Petitioner "played a role in the defense[.]" The Petitioner's complaint that he had to file his own motions and that Trial Counsel was ineffective because he only met with him twice prior to trial is overstated. On cross-examination, Trial Counsel testified that it was "possible" he only met with the Petitioner twice and that he did not recall exactly how many meetings took place or whether he filed any pre-trial motions. Additionally, the Petitioner, himself, discredited his assertions of ineffectiveness. He testified about pre-trial meetings with Trial Counsel and discussions regarding the case. The Petitioner stated that Trial Counsel conferred with him regarding impeachment evidence, various plea offers, and whether he should testify in his own defense.

The Petitioner simply states vague and ambiguous second-guesses and regrets. At the hearing, the Petitioner's primary allegation was that the State made threats against co-defendant Morgan and forced her to testify against him.⁴ The post-conviction court framed the issue as follows: "Petitioner contends his co-defendant, Patricia Morgan, who is currently serving a sentence of (10) years Tennessee Department of Correction at 100%, now states her trial testimony was coerced by the District Attorney's Office with the threat of a life sentence." In the instant case, Trial Counsel's strategy was to attack the strength of the State's case through cross-examination. The post-conviction court noted, "Morgan testified at [the Petitioner's] trial and was vigorously cross-examined [sic] by the Petitioner's counsel, specifically about her deal with the District Attorney

⁴ At the post-conviction hearing, the Petitioner presented, as newly discovered evidence, four letters from Ms. Morgan to the Defendant in support of his contention that her testimony was coerced. The post-conviction court did not allow the letters into evidence, concluding that they constituted inadmissible hearsay. However, the court did allow the Petitioner to submit the letters as an offer of proof and addressed the Petitioner's allegation of coercion in its order denying relief.

involving her negotiated plea and sentence.” Moreover, the Petitioner admitted that Trial Counsel impeached Ms. Morgan at trial with a letter she had written to the Petitioner. The post-conviction court found that Trial Counsel was not ineffective in this regard and that the Petitioner had failed to demonstrate prejudice as “Ms. Morgan’s trial testimony was corroborated by a ‘mountain’ of evidence against the Petitioner.”

In sum, the testimony at the post-conviction hearing reflects that Trial Counsel and the Petitioner met to prepare for trial and the lines of communication were open and used by both the Petitioner and his trial counsel, allowing the Petitioner to make well-informed decisions and assist in his defense. In addition to Ms. Morgan’s testimony, the State’s case included an audio tape of the phone conversation between the Petitioner and Ms. Morgan, photographs of the victim, the victim’s testimony, and prison telephone records.

The proof of the factual allegations supporting the claim of ineffective assistance of counsel falls far short of clear and convincing evidence. The Petitioner has not demonstrated prejudice from any of the Trial Counsel’s alleged errors. Accordingly, the Petitioner failed to show that his counsel’s representation fell outside the wide range of reasonable professional assistance. See Terry T. Lewis v. State, No M2005-01673-CCA-R3-PC, 2006 WL 1063314 (Tenn. Crim. App., Nashville, Apr. 20, 2006).

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court properly denied the petition for post-conviction relief. Accordingly, the judgment of the Cumberland County Criminal Court is affirmed.

DAVID H. WELLES, JUDGE